

STATE OF MICHIGAN  
COURT OF APPEALS

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MICHAEL MENDOZA,

Plaintiff-Appellant,

v

GLEN BOWLES,

Defendant-Appellee.

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UNPUBLISHED  
February 14, 2006

No. 255171  
Macomb Circuit Court  
LC No. 2002-005826-NO

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's summary dismissal of his case under MCR 2.116(C)(10). We affirm.

Plaintiff commenced this action after he was shot by defendant, a Clinton Township police officer. Defendant responded to a domestic violence dispute and encountered plaintiff's girlfriend, Wendy Love, who was crying. Love informed defendant that plaintiff had kicked her and broken her leg. Plaintiff was sitting on a couch next to a rifle that was partially covered with a blanket. It is undisputed that defendant repeatedly ordered plaintiff not to touch the rifle and that, despite defendant's commands, plaintiff reached toward it. Defendant shot plaintiff and continued shooting until plaintiff stopped trying to gain control of the rifle. Thereafter, plaintiff commenced this action alleging (1) assault and battery, and (2) "gross negligence-excessive force" claims. The trial court granted defendant's motion for summary disposition, finding that reasonable minds could only conclude that defendant acted reasonably, that defendant's conduct was not the proximate cause of plaintiff's injuries, and that defendant did not act unlawfully in using force against plaintiff.

Plaintiff argues that the trial court improperly granted summary disposition because there was a question of fact whether defendant's actions were reasonable. After de novo review of the trial court's decision, considering the documentary evidence submitted by the parties, we disagree and conclude that defendant was entitled to judgment as a matter of law. See MCR 2.116(C)(10); *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Because defendant was a police officer acting in the line of duty, pursuant to MCL 691.1407(2)(c), he is immune from tort liability unless he was grossly negligent, and his gross negligence was the proximate cause of the injury or damage. Here, plaintiff's gross negligence claim was premised on defendant shooting him. But, it is well-established that an intentional tort

claim, like the allegation here that excessive force was used, cannot be converted into a claim of gross negligence. See *VanVorous v Burmeister*, 262 Mich App 467, 483-484; 687 NW2d 132 (2004); *Smith v Stolberg*, 231 Mich App 256, 258-259; 586 NW2d 103 (1998); *Sudul v Hamtramck*, 221 Mich App 455, 458, 477; 562 NW2d 478 (1997). Therefore, plaintiff did not state a claim for gross negligence upon which relief could be granted and summary disposition is proper pursuant to MCR 2.116(C)(8). See *VanVorous*, *supra* at 484. Because the trial court properly dismissed the claim, albeit under MCR 2.116(C)(10) and for a different reason, we affirm the decision. See *Wickings v Artic Enterprises, Inc.*, 244 Mich App 125, 150; 624 NW2d 197 (2000).

Next, we address plaintiff's assault and battery claim, an intentional tort claim. A government employee is not granted immunity for intentional torts. See *Sudul*, *supra*. But, actions of a governmental employee that would normally be considered an intentional tort are shielded from liability if those actions were justified because they were objectively reasonable under the circumstances. *VanVorous*, *supra* at 483. Police officers acting in the line of duty may use reasonable force when making an arrest. See *Brewer v Perrin*, 132 Mich App 520, 528; 349 NW2d 198 (1984). The issue here is whether defendant employed reasonable force when he shot plaintiff, i.e., whether his actions were objectively reasonable under the circumstances. "The force reasonably necessary to make an arrest is 'the measure of necessary force [] that [] an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary.'" *VanVorous*, *supra* at 481, quoting *Brewer*, *supra*. We agree with the trial court that there is no genuine issue of material fact that defendant used reasonable force under the circumstances. See MCR 2.116(C)(10).

The evidence in this case, viewed in a light most favorable to plaintiff, established that plaintiff severely injured Love even before defendant arrived. Defendant could see that Love's leg was bent at an abnormal angle and appeared to be broken, and she told him that plaintiff had a rifle under a blanket next to him. Plaintiff was seated on a couch next to the rifle, which defendant knew had greater firing power than defendant's pistol. Plaintiff acknowledged that defendant drew a service pistol and warned him not to touch the rifle. Despite defendant's warnings, plaintiff reached for the rifle. Plaintiff denied that he pointed the rifle at defendant, but admitted that he moved both of his hands, moved at least one hand in the direction of the gun, and could have touched the rifle if he wanted to. Plaintiff did not remember where his hands were during the shooting. Although plaintiff disputes portions of defendant's testimony concerning the timing of the shots and the position of the weapon, the evidence clearly established that there was a tense and volatile situation, and that plaintiff disregarded defendant's command not to touch the rifle. Plaintiff's suggestion that defendant should have waited longer before shooting because plaintiff may have only intended to "show the officer what he had on his lap" is not persuasive. On these facts, defendant is entitled to governmental immunity because his actions were justified, i.e., objectively reasonable under the circumstances. Therefore, plaintiff's assault and battery claim was properly dismissed.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Joel P. Hoekstra

/s/ Jane E. Markey